State Public Service Commission, Sarawak v Sarjit Singh Khaira

COURT OF APPEAL (KUCHING) — CIVIL APPEAL NO Q–02–351 OF 1996
SHAIK DAUD, SITI NORMA YAAKOB AND DENIS ONG JJCA
28 AUGUST 1998

Administrative Law *— Dismissal from service — Failure to comply with transfer order by Sarawak State Secretary — Whether delegation of power by Public Services Commission to State Secretary could validate the order retrospectively*

The respondent ('SSK') joined the Sarawak Civil Service in 1961. In 1975, he accepted an offer of appointment by transfer to the post of senior accounting officer in the State Public Works Department ('PWD') Simmanggang and remained so until his transfer to PWD Headquarters in Kuching at the end of 1977. On 28 April 1987, SSK was informed, vide a transfer order, to arrange for a transfer to the State Treasury, Limbang. He appealed twice to the State Secretary against the order, but was unsuccessful. However, he remained in Kuching. On 7 September 1987, SSK was charged with refusing to obey a lawful order of the Sarawak Government thus going against General Order 69 ('GO 69'). SSK denied the charge and furnished 12 grounds in writing to the appellant ('PSC'). The main ground was that the transfer order was unjust, irregular, improper, arbitrary and/or illegal. A committee was set up to enquire into the charge and found him guilty of violating GO 69. The PSC decided that he be dismissed from the State public service as accounting officer. In a statement pursuant to O 53 r 1(2) of the Rules of the High Court 1980 ('the RHC'), SSK challenged the decision of the PSC to dismiss him from the State public services on four grounds: (i) lack of jurisdiction of the PSC to institute disciplinary proceeding against SSK; (ii) fundamental error of law in that the disciplinary action against him was vitiated by the fact that there was no lawful transfer order; (iii) breach of the rules of natural justice; and (iv) the purported dismissal of SSK was brought fraudulently by abuse of power, in bad faith and with ulterior motives. The High Court (see [1995] 3 MLJ 112) held that the PSC lack jurisdiction since the decision to transfer SSK was of the State Secretary and not the decision of the PSC, thus the report of the committee of enquiry was also invalid and unlawful. In the appeal, PSC contended that vide Delegation 1/67 and Delegation 1/89, the PSC had delegated its executive power to the State Secretary thus, validating the transfer order.

Held, dismissing the appeal with costs:

The decision to transfer SSK was a decision of the State Secretary and not that of the PSC. There was no mention or suggestion whatever of the involvement of the PSC in the memorandum or that such memorandum was issued pursuant to its direction, in its name or on its behalf (see p 626D–E). The State Secretary has no power,

concurrent or delegated, to decide on an interdepartmental transfer of SSK from the post of senior accounting officer in PWD to the post of senior accounting officer in the State Treasury Department in the transfer order (see p 632F–G). Since SSK was not in the common user group, Delegation 1/67 was irrelevant and the transfer order was in no sense validated by it (see p 635B–C). On the issue of Delegation 1/89 under which the PSC purported to delegate their executive power to the State Secretary with retrospective effect, purportedly to validate the latter's decision on the transfer, subsequent vesting of power in the delegate was insufficient; the power must exist at the time of its purported exercise by the delegate and that moment in time was crucial (see pp 640H and 641E); *LS v Director General of FACS* (1989) 18 NSWLR 481 followed. On the question of law, the PSC lacked jurisdiction to initiate proceeding against SSK or to dismiss him from the public service of the State based on the report of the committee of enquiry (see p 643F-G).

[Bahasa Malaysia summary

Penentang ('SSK') mula berkhidmat dengan Perkhidmatan Awam Sarawak pada 1961. Pada 1975, beliau telah menerima tawaran perlantikan melalui pertukaran kepada jawatan pegawai akaun kanan di dalam Jabatan Kerja Raya Negeri ('JKR') Simmanggang dan berkhidmat sehingga beliau ditukarkan ke Ibupejabat JKR di Kuching pada penghujung 1977. Pada 28 April 1987, SSK telah diberitahu, melalui satu perintah pertukaran, untuk bersedia bertukar ke Perbendaharaan Negeri, Limbang. Beliau telah merayu sebanyak dua kali kepada Setiausaha Negeri terhadap arahan tersebut tetapi tidak berjaya. Walau bagaimanapun, beliau tetap tidak bertukar dari Kuching. Pada 7 September 1987, SSK telah didakwa melanggar satu perintah sah Kerajaan Negeri Sarawak dan seterusnya melanggar Perintah Am 69 ('PA 69'). SSK menafikan dakwaan tersebut dan memberikan 12 alasan bertulis kepada perayu ('PSC'). Alasan utamanya ialah arahan perintah tersebut tidak adil, luar aturan, tidak wajar, sewenang-wenang dan/atau menyalahi undang-undang. Satu jawatankuasa telah ditubuhkan bagi menyiasat dakwaan tersebut dan mendapati bahawa beliau bersalah melanggar PA 69. PSC memutuskan bahawa beliau dihentikan daripada perkhidmatan awam Negeri sebagai pegawai akaun. Di dalam satu pernyataan mengikut A 53 k 1(2) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'), SSK mencabar keputusan PSC tersebut untuk menghentikan beliau dari perkhidmatan awam Negeri berdasarkan empat alasan: (i) ketiadaan bidang kuasa PSC untuk mengadakan satu prosiding disiplin terhadap SSK; (ii) kesilapan undang-undang asasi yakni prosiding disiplin terhadap SSK tidak sah kerana tiada satu arahan pertukaran yang sah; (iii) perlanggaran rukun keadilan asasi; dan (iv) pemberhentian SSK telah dilakukan dengan penipuan melalui penyalahgunaan kuasa, niat jahat dan mempunyai tujuan tersembunyi. Mahkamah Tinggi (lihat [1995] 3 MLJ 112) telah memutuskan bahawa PSC tiada bidang

kuasa kerana keputusan untuk menukar SSK adalah keputusan Setiausaha Negeri dan bukan keputusan PSC, oleh itu laporan jawatankuasa siasatan adalah tidak sah dan menyalahi undang-undang. Di dalam rayuannya, PSC telah berhujah bahawa melalui Delegasi 1/67 dan Delegasi 1/89, PSC telah mewakilkan kuasa eksekutifnya kepada Setiausaha Negeri, dan oleh itu, mengesahkan perintah pertukaran tersebut.

Diputuskan, menolak rayuan dengan kos:

Keputusan menukarkan SSK adalah keputusan Setiausaha Negeri dan bukan keputusan PSC. Tiada sebarang sebutan atau cadangan sama sekali mengenai penglibatan PSC di dalam memorandum tersebut atau bahawa memorandum sedemikian dikeluarkan mengikut arahan PSC di dalam namanya atau bagi pihaknya (lihat ms 626D–E). Setiausaha Negeri tiada kuasa, sama ada bersama atau melalui perwakilan, untuk memutuskan pertukaran antara jabatan bagi SSK dari jawatan pegawai akaun kanan JKR kepada pegawai akaun kanan Jabatan Perbendaharaan Negeri di dalam perintah pertukaran tersebut (lihat ms 632F–G). Oleh kerana SSK bukan di dalam kumpulan pengguna bersama, maka Delegasi 1/67 adalah tidak relevan dan perintah pertukaran tersebut tidak disahkan olehnya (lihat ms 635B–C). Mengenai Delegasi 1/89 yang mana PSC dikatakan mewakilkan kuasa eksekutifnya kepada Setiausaha Negeri dengan kesan kebelakangan, kononnya untuk mengesahkan keputusan pertukaran tersebut, perwakilan kuasa secara retrospektif tidak mencukupi; kuasa tersebut mestilah telah wujud ketika perlaksanaan dengan perwakilan kononnya dilakukan dan masa ketika itu adalah penting (lihat ms 640H dan 641E); *LS v Director General of FACS* (1989) 18 NSWLR 481 diikut. Tentang persoalan undang-undang, PSC tiada bidang kuasa untuk mengadakan prosiding disiplin terhadap SSK atau memberhentikan beliau daripada perkhidmatan awam Negeri berdasarkan laporan jawatankuasa sisatan (lihat ms 643F–G).]

Notes

For cases on dismissal from service, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 21–23.

Cases referred to

Aria Kumar @ Omar Abdullah & Anor v Ketua Pengarah Jabatan Hasil Dalam Negeri Malaysia & Anor [1994] 3 AMR 2572 (refd)

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] MLJ 169 (refd)

Baltim Timber Sdn Bhd v The Minister for Resource Planning & Ors [1993] 2 CLJ 327 (refd)

F Hoffman-La Roche & Co AG & Ors v Secretary for Trade and Industry [1974] 2 All ER 1128, [1974] 3 WLR 104 (refd)

Ferd Dawson Calvin v John Henry Brownlow Carr & Ors [1980] AC 574 (refd)
Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd [1997] 2 CLJ 777 (refd)
LS v Director General of FACS (1989) 18 NSWLR 481 (folld)
Mohd bin Ahmad v Yang di-Pertua Majlis Daerah Jempol, Negeri sembilan [1997] 2 MLJ 361 (refd)
Pengarah Pelajaran, Wilayah Persekutuan & Ors v Loot Ting Yee [1982] 1 MLJ 68 (distd)
R v Panel on Take-overs and Mergers, ex p Datafin plc & Anor (Norton Opax plc and another intervening) [1987] 1 All ER 564 (refd)
Skinner (an infant), Re; Skinner v Carter [1948] 1 All ER 917 (refd)

Legislation referred to

Federal Constitution art 132(2) and (3)
Public Service Commission Rules 1964 rr 1(2), 2, 7, 23(1)(a)
Rules of the High Court 1980 O 53 r 1(2)
Sarawak State Contitution art 36(1), (3) and (6), art 37(3)
State Public Service (Condition of Service) Ordinance (Cap 12/94) Sarawak
State Public Service General Orders 1996 (Swk LN 1/96)

Zaki Tun Azmi (*Vishnu Kumar, Abdul Halim Hj Sabil, Mansheel Kaur & Wong Sioun Tung* with him) (*Rashid, Lee & Partners*) for the appellant.
TO Thomas (*Manjit Singh & Balvinder Singh* with him) (*Thomas & Co*) for the respondent.

Denis Ong JCA (delivering the judgment of the court): This is an appeal against the judgment of Kuching High Court II dated 7 July 1995 (reported in [1995] 3 MLJ 112 sub nomine *Re Sarjit Singh Khaira*) wherein it allowed the motion of the respondent herein ('SSK') for certiorari to issue and quash the decision dated 14 December 1988 of the appellant herein the (PSC) to dismiss SSK from the public service of the State of Sarawak with effect from 1 January 1989 and ordered costs against the PSC.

This appeal was part heard by us on 28 October 1997 and because of time constraint, we adjourned the hearing and directed submissions in writing from both sides and the reply, if any, by 9 December 1997. On 28 August 1998 we gave an oral decision in which we affirmed the judgment of Kuching High Court II and dismissed the appeal with costs and directed the deposit to be paid to SSK towards the account of taxed costs. We also dismissed the cross-appeal of SSK. At the same time we intimated that the full reasons would follow and we do so now.

First the facts of the case and the background of this appeal. SSK joined the Sarawak Civil Service on 2 October 1961. Until mid April 1975, he was Examiner of Accounts in the Federal Audit Department Kuching. His basic salary was RM640 per month. Under the system of classification set out in para 20 of Federal Service Circular No 9 of 1971 (Suffian Circular) he belonged to the Clerical and Technical Group. On 10 April 1975 he

accepted an offer of appointment by transfer to the post of Senior Accounting Officer in the State Public Works Department (PWD) Simmanggang. Although expressly stipulated in the offer of appointment to be on permanent and pensionable terms the appointment was stated as probationary for one year from the date of assumption of duties and was liable to be terminated if it was not confirmed. Confirmation was dependent upon satisfactory performance and the production of a medical certificate. He assumed duties on 16 April 1975 in PWD Simmanggang where he remained until his transfer to PWD Headquarters in Kuching sometime towards the end of 1977. In the absence of anything in the Appeal Record to indicate that such probationary appointment was terminated, it was assumed that his appointment was in fact confirmed. The post of Senior Accounting Officer was on the salary scale C3-5 (740 x 40 - 900/940 x 40 - 1,000/1150 x 50 - 1250) and in the Executive and Sub-Professional Group under the Suffian Circular.

On 6 June 1978 SSK opted for the new scheme under Federal Service Circular No 2 of 1978 (the New Scheme) and converted to the salary code B3 (1405 x 60 = 1585). His new clean wage was RM1456 per month. The post of Senior Accounting Officer PWD was upgraded from B3 to the salary Code A22 in the New Scheme with effect from 11 January 1982 following a circular issued by the Public Services Tribunal but nothing was known of the new clean wage SSK should have received per month.

By a memorandum written in the Malay language dated 25 April 1987 Haji Bujang Mohidin Jol, who signed for the State Secretary Sarawak, informed the Director of PWD and the Accountant General Sarawak of a decision made to transfer SSK. A certified English translation of the Memorandum reads as follows:

> I am to inform you that a decision has been made to transfer Mr Sarjit Singh Khaira to the State Treasury Limbang in exchange with Mr Richard Leong Hee Cheong.
>
> (2) The transfer should take effect as soon as possible. Besides that the officer concerned must be informed that the Government will not consider any appeal that might be made by the officer concerned or on his behalf.
>
> (3) I will be pleased if you can inform me of the progress on the matter in connection with the transfer.

On 28 April 1987 Kho Kwang Hui, who signed for the Acting Director PWD, wrote a letter (hereafter referred to as 'the transfer order') marked 'Confidential' to SSK through the Acting Senior Accountant, PWD Headquarters in the following terms:

> I am directed to convey the decision of the State Secretary, Sarawak that you are to be transferred to Treasury, Limbang in exchange with En Richard Leong Hee Cheong.
>
> (2) It has also been directed that the transfer should take effect as soon as possible. In view of this you are hereby instructed to proceed on transfer within 2 weeks from the date of this letter.

A (3) Please arrange with the Personnel Section in respect of your passages and travelling arrangement without any delay.

On 29 April 1987 SSK appealed in writing ('the first appeal') to the State Secretary Sarawak to reconsider the decision to transfer him to the State Treasury Department in Limbang chiefly on health grounds, the lack of B medical facilities there and also on the understanding reached between the Sarawak Government Officers Union (SGOU) and the State Government of Sarawak that the principal officers of SGOU would not be transferred away from Kuching during their tenure of office but the first appeal was refused. He did not proceed to Limbang on transfer and remained in Kuching. On 26 May 1987 he appealed again in writing ('the second C appeal') to the State Secretary this time on the ground that the transfer decision was improper, illegal and unjust because the post of Senior Accounting Officer did not come under the common user services. This fact was recorded in the judgment of the High Court although the second appeal was not included in the Appeal Record. There was no response from the State Secretary to the second appeal and he continued to remain in D Kuching.

On 7 September 1987 Hj Morshidi Hj Shaharin, who was the PSC Secretary, wrote to SSK through the State Secretary and the State Accountant General requiring SSK within 21 days to furnish grounds to exculpate himself of the charge specified therein. The English version of the E charge read thus:

> That you Sarjit Singh Khaira, on or about 11 May 1987 while serving as Senior Accounting Officer (Scale A22) in Public Works Department, Kuching you have refused to obey lawful order of the Sarawak Government which was issued by the acting Director of Public Works vide letter reference PWD/CSF/469 dated 28 April, 1987 which directed you to be transferred as F Senior Accounting Officer, PWD, Kuching to Treasury Department, Limbang within two (2) weeks from the date the letter was issued, but up to the expiry period mentioned and up to now, you have not yet transferred to Treasury Department, Limbang and as such you have gone against GO 69.

On 3 October 1987 SSK denied the charge and furnished 12 grounds in G writing to the PSC Secretary through the State Accountant General. His main ground was that the transfer order dated 28 April 1987 and its enforcement was unjust, irregular, improper, arbitrary and/or illegal. He argued that the posts of Senior Accounting Officer PWD and that of the State Treasury Department Limbang did not come under the common user scheme, that the holders thereof were not transferable or exchangeable as H the Government wishes without an option, and that the duties of the two posts were very different.

On 11 January 1988, Steve LK Shim (then Sessions Court judge Kuching) wrote to SSK to inform him that he was appointed by the PSC as chairman of a committee to enquire into the charge. The letter also notified SSK that the enquiry had been fixed for 29 February 1988 at Kuching I Sessions Court I, requested his presence and informed him of his rights to call witnesses and to representation. The committee sat on the date fixed and concluded the enquiry on 15 September 1988.

On 22 December 1988 Abdul Ghafur Shariff, who was the PSC acting Secretary, wrote to SSK through the State Secretary and the State Accountant General to inform SSK that the PSC agreed with the report of the committee which found SSK guilty of violating General Order 69 (GO 69) and that under r 23(1)(a) of the Public Service Commission Rules published as Swk LN 45/64 (the PSC Rules), the PSC had decided that he be dismissed from the State public service as an Accounting Officer with effect from 1 January 1989. The report of the committee was not included in the Appeal Record and was also not available to the High Court.

On 12 December 1990, Kuching High Court II granted leave to SSK to apply for an order of certiorari to quash the decision of the PSC. The Motion proper dated 12 December 1990 was heard intermittently starting from 10 July 1991 and on 7 February 1992 the High Court dismissed it solely for the reason that PSC was not a party to the certiorari proceeding under OM/KG 26/90. SSK appealed to the then Supreme Court against the decision of the High Court and on 30 May 1994 the Supreme Court ordered the High Court to continue with the hearing of the said motion. By a motion dated 15 June 1994 the PSC applied to set aside the order of the Supreme Court dated 30 May 1994. SSK countered by another motion dated 11 August 1994 to strike out or dismiss the said motion of the PSC and on 15 September 1994 the Supreme Court ordered the dismissal of the PSC's motion. Various affidavits were filed thereafter by both sides, parts of which were struck out pursuant to the ruling of the High Court and also an affidavit withdrawn by SSK through his counsel following such ruling (see Appeal Record Part B pp 56–59). In compliance with the Supreme Court order dated 30 May 1994 hearing on the merits of the Motion dated 12 December 1990 resumed on 30 December 1994 and ended on 24 January 1995 whereupon the High Court reserved judgment. On 7 July 1995, the High Court delivered its judgment in writing, allowed the said motion, quashed the decision dated 14 December 1988 of the PSC and ordered costs to be borne by the PSC.

In the statement pursuant to O 53 r 1(2) of the Rules of the High Court 1980 ('RHC 1980'), SSK challenged the decision dated 14 December 1988 of the PSC to dismiss him from the State public service on four grounds namely: (1) lack of jurisdiction in that essential requirements preliminary to the disciplinary action were disregarded, or that disciplinary proceedings were otherwise improperly/unconstitutionally instituted; alternatively; (2) a fundamental error of law on the face of the record in that the disciplinary action against SSK for alleged disobedience of a transfer order was vitiated by the fact that there was no lawful order of transfer; (3) breach of the rules of natural justice in that the committee of enquiry allowed documentary evidence to be used against SSK contrary to r 26(4) of the PSC Rules, that SSK was refused an adjournment to engage another counsel to represent him at the hearing before such committee that SSK was forced to attend the inquiry when he was physically and mentally in no condition to do so, that he was refused the notes of proceeding to prepare his submission and that the chairman and committee members were biased; and (4) fraud in that the prosecuting party knew that the transfer order was not a lawful order

within the provision of GO 69; that the prosecuting party fraudulently accused SSK of not having reported for duty at Limbang on 11 May 1987 well knowing that it was impossible for SSK to hand over duty to Lau Sie Kiong the acting Senior Accountant until after 11 May 1987 and to deprive SSK of the defence of absence of wilful neglect or refusal, and that the purported dismissal of SSK was brought about fraudulently by abuse of power, in bad faith and with ulterior motives.

All the four grounds were canvassed in the written submissions to the High Court of learned counsel for the PSC, SSK and also the learned State Attorney General who appeared for the State Government. The High Court in its judgment found that there were merits in the first and second alternative grounds and ordered certiorari to issue without the necessity to decide on the remaining grounds. In its judgment a determination of the issue of the validity of the transfer order in dispute was crucial to the decision of the question of jurisdiction or the lack of it (in the *Anisminic* sense) of the PSC to institute disciplinary proceeding against SSK. It determined that the transfer order was invalid for these reasons:

(a) GO 40(1)(a) was irrelevant and inapplicable as SSK belonged to the executive and sub-professional group of officers which did not come within categories of officers specified in that GO;

(b) under art 36(1) and (3) of the Constitution of the State of Sarawak published as GNS 163/63 (the State Constitution) the authority empowered to transfer SSK from PWD to the State Treasury was the PSC;

(c) the post of Senior Accounting Officer PWD (of which SSK was the incumbent at Headquarters Kuching) was not an appointment or duty post included in the Letter of Delegation No 1/67 (Delegation of Powers) of the PSC dated 20 December 1967 (hereafter referred to as 'Delegation No 1/67') and

(d) although by items 17 and 18 of the Schedule to the Instrument of Delegation of Powers Bil No 1/89 — Delegation of Powers (Transfer) by the PSC dated 28 November 1989 ('Delegation No 1/89'), the power to transfer Senior Accounting Officers in B3 and A22 respectively of the New Scheme was expressly delegated to the State Secretary with retrospective effect to 20 December 1967, that delegation could not validate or ratify the unlawful transfer order as it had adversely affected the substantive right of SSK to be transferred by no other than the PSC and further such delegated legislation was made without the requisite consent of the Yang Dipertua Negeri Sarawak as provided by art 37(3) of the State Constitution.

In the first place the High Court observed that the decision to transfer SSK from the PWD Kuching to the State Treasury Department in Limbang which was stated in the transfer order was the decision of the State Secretary and not the decision of the PSC. It stated that the burden was on the PSC to satisfy itself that such a decision was lawful by carrying out a preliminary investigation required by r 26(1)(b) of the PSC Rules following a complaint

from the State Secretary. If the PSC had carried out a proper investigation instead of paying lip service to r 26(1)(b) and agreeing with the transfer order, it would have come to the same conclusion that the transfer order was invalid or unlawful and declined jurisdiction to frame the charge or to ask SSK to show cause. Thus the High Court held that the PSC lacked jurisdiction to institute disciplinary proceeding and that the decision to dismiss SSK based on the report of the committee of enquiry was also invalid and unlawful.

As we saw it, the transfer exercise started with the memorandum dated 25 April 1987 signed by Bujang Mohidin Jol on behalf of the State Secretary, addressed to the Director of PWD and to the State Accountant General. That memorandum did not identify specifically who made the decision to transfer SSK from PWD Headquarters Kuching to the State Treasury Department Limbang in exchange with one Richard Leong Hee Cheong. The query which occurred to the High Court and to us as well was whether that decision to transfer SSK was a decision of the State Secretary or of the PSC. In our view that query was a query on fact.

Although under the State Constitution the authority to decide on the transfer of SSK, a member of the public service of the State was the PSC, directly under art 36(1) and (3) or indirectly by delegation made under art 36(6) thereof, there was no mention or suggestion whatever of the involvement of the PSC in the memorandum or that such memorandum was issued pursuant to its direction, in its name or on its behalf. Consequently we had no hesitation in saying as the High Court had appropriately observed that the decision to transfer SSK appeared not to be that of the PSC.

Next, was it a decision of the State Secretary. Kho Kwang Hui, the acting Director of PWD to whom the memorandum was addressed, understood the decision to transfer SSK to be that of the State Secretary which he was directed to convey to SSK in his confidential letter dated 28 April 1987. Datuk Amar Bujang Mohd Nor, who was the State Secretary at the material time, acknowledged before the committee of enquiry that he alone made the decision to transfer SSK and in his official capacity as State Secretary. He said that he acted under GO 39 and GO 40(2) and to him 'any officer' in GO 40(2) meant any officer in the public service and was not restricted to the categories of officers specified in GO 40(1). He further said that he regarded the post of Senior Accounting Officer as a common user post based on a joint circular memorandum dated 25 August 1967 issued by the Federal Secretary and the State Secretary which circular was never cancelled. He said that his decision was final which in the light of the memorandum dated 25 April 1987 could only have meant that he made up his mind that SSK must proceed on transfer without delay regardless of any appeal to be made by him or on his behalf.

For these reasons we respectfully agreed with the observation of the High Court that the decision to transfer SSK was a decision of the State Secretary and not that of the PSC.

A It was clear to the High Court and to us that the question for determination was the question of jurisdiction of the PSC or the lack of it to initiate disciplinary proceeding against SSK and to dismiss him from the public service of the State based on the report of the committee of enquiry. That was a question of law the answer to which depended on a decision as to the lawfulness or validity of the transfer order an essential ingredient of B the disciplinary charge which was disputed in the first and second alternative grounds of the statement pursuant to O 53, r 1(2) of RHC 1980.

It is a fact beyond dispute that the PWD and the State Treasury Department are two separate departments of State under two separate Heads of Expenditure in the annual approved Estimates of Expenditure for C the State of Sarawak. Read in the light of the particulars given in the disciplinary charge it was clear that the transfer order in question was a transfer of SSK from the post of Senior Accounting Officer PWD Kuching of which he was the incumbent to the post of Senior Accounting Officer State Treasury Department Limbang of which Richard Leong was the incumbent. The transfer order comprised of two matters namely:

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(a) the transfer of SSK, from one post to another post and from one department to another department, that was to say, an interdepartmental transfer of SSK from the post of Senior Accounting Officer in PWD to the post of Senior Accounting Officer in the State Treasury Department (hereafter referred to as 'matter (a)') and

E (b) the transfer or posting of SSK to serve in the Divisional Office of the State Treasury Department in Limbang and when such transfer was to be effected (hereafter referred to as 'matter (b))'.

In the order of things, matter (a) had to be cleared first by a reference to the competent authority for a decision one way or the other. It was a condition F precedent which must be fulfilled. The decision on matter (b) would arise only if the decision in matter (a) was for an interdepartmental transfer. If the decision were otherwise, matter (b) would not arise. The problem with the transfer order was that it lumped the two matters together thereby obscuring the issues and added to confusion.

G The first appeal of SSK was in substance an appeal to the State Secretary on matter (b) which was refused. His second appeal and his reply dated 3 October 1987 to the show cause letter dated 7 September 1987 from the PSC Secretary concerned matter (a). In regard to the latter, he contended that he was not liable to be transferred out of PWD to the State Treasury Department without his option or consent because his service as H Senior Accounting Officer PWD and that of the Senior Accounting Officer State Treasury Department were not common user services. SSK repeated the same contention before the committee of enquiry citing a statement in the decision of the Public Services Tribunal in Reference No 57 of 1980 which stated that the senior accounting officers scheme was not a common user scheme. In addition, he pointed out that since the transfer involved two I departments, and indeed all transfers under GO 40(1), it must be done in accordance with the PSC Rules by reference to the meaning of 'transfer' in r 2 and the procedure laid down in r 7. Before the High Court, these

contentions were comprehended in the first and second alternative grounds in para 3(1) of the statement pursuant to O 53 r 1(2) of the RHC 1980. A

Before the committee of enquiry the State Government relied solely on GOs 39 and 40 in support of its contention that the State Secretary was empowered to decide on both matter (a) and matter (b) in the transfer order. There was no mention whatever of Delegation No 1/67 or of Delegation No 1/89. Under GO 40(1)(a), it was maintained before the committee by Hj Zakaria P Nyumay (PW5) and Hj Bujang Mohidin Jol (PW7) and Datuk Amar Bujang Mohd Nor (DW4) that the post of Senior Accounting Officer PWD was a common user post the incumbent of which was transferable by the State Secretary from one department to another. But even if it was not a common user post, the incumbent as an 'officer' was still transferable by the State Secretary by virtue of his overall powers under GO 40(2). The learned Deputy State Attorney General submitted before the committee that the power to transfer a State Officer within the State Civil Service was vested in the State Secretary under GO 39 and GO 40(2) irrespective of whether he was under a common user scheme or not. B C D

Before the High Court the PSC brought in for the first time, Delegation No 1/67, Delegation No 1/89, and the establishment practice of the Office of the State Secretary with regard to the transfer and posting of officers in the public service of the State in addition to its reliance on GO 39 and GO 40(2). This was clear from the affidavit affirmed on 5 December 1994 of Hj Mazlan bin Hj Hamdan, a member of the PSC. E

Clearly, the point in dispute between the parties was whether it was the PSC or the State Secretary who was the competent authority to decide on matter (a) and on matter (b). That was a point of law for the High Court to rule. The High Court ruled that the competent authority to decide on matter (a) was the PSC regardless of whether the post of senior accounting officer was a common user post. On whether the State Secretary was empowered to decide on matter (a), it ruled that independently of the PSC, the State Secretary had no concurrent power to do so. It stated in the judgment: F

> Without this express delegation, the State Secretary, on his own, has no power to transfer a member of the public service from one department of government to another. G
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> As the transfer involves the transfer from one department to another, clearly as stated earlier, the State Secretary has no power under the General Orders to do so on his own.

The first complaint of the PSC to us in the written submission was that the transfer order was made not under GO 40(1) but under the overriding provisions of GO 40(2) read with GO 39. In this regard it was pointed out that the High Court misdirected itself in the first reason it gave for determining that the transfer order was invalid and also that it failed to consider GO 40(2). The PSC argued that the entire General Orders (Revised 1 May 1965) and Delegation No 1/67 were in fact 'directions in writing' under art 36(6); and GO 40 in particular, was a delegation by the PSC to the State Secretary of its power to transfer members of the public H I

service of the State. Hence 'transfer' in GO 40 bore the same meaning assigned to that term by r 2 of the PSC Rules. The PSC said that the State Government had the right to transfer its officers and cited *Pengarah Pelajaran, Wilayah Persekutuan & Ors v Loot Ting Yee* [1982] 1 MLJ 68 (FC) and *Aria Kumar @ Omar bin Abdullah & Anor v Ketua Pengarah Jabatan Hasil Dalam Negeri Malaysia & Anor* [1994] 3 AMR 2572 (HC) at p 2575 in support thereof. The PSC said that the duty to give effect to that right was the PSC by virtue of art 36 of the State Constitution. The State Secretary derived his power to transfer officers from the PSC by delegation by way of 'directions in writing' under art 36(6). Thus the PSC submitted that the State Secretary was empowered by delegation in GO 40(2) read with GO 39 to make the transfer order.

In his written submission to us, SSK distinguished *Loot*'s case from the case of SSK on the facts and on the law and cited Haidar J's judgment in *Sarjit Singh Khaira v Government of Sarawak & Anor* [1990] 2 MLJ 251 in support of such distinction and said that reliance on *Loot*'s case was misconceived. He pointed out that the power to transfer was not derived from art 36(6) but from art 36(1) of the State Constitution which corresponded to art 144(1) of the Federal Constitution. Article 144(1) was considered in *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169 (PC). SSK agreed with the PSC that delegation was by way of 'directions in writing' but disputed that the General Orders and Delegation No 1/67 were in fact 'directions in writing' and in his view, certainly not 'directions in writing' within art 36(6) because firstly, the General Orders had no force of law and secondly, they did not state that they were made with the consent of the Yang Dipertua Negeri and were not published in the Sarawak Gazette which were required of delegations or directions in writing under art 36(6). He submitted that the State Constitution and r 1(2) and r 7 of the PSC Rules applied to SSK who had at all material times been the holder of a post in the public service; that the General Orders including GO 40(2) which had no force of law could not delegate to the State Secretary the duty/power to transfer vested in the PSC by the State Constitution with the prescribed procedure under r 7, and that the PSC had the duty and power to transfer all members of the public service. He added that although the PSC could delegate any of its function, still it was its own duty and its own power that it delegated and that the PSC remained throughout the authority which had power to transfer even when it did it by a delegate.

It is convenient to start our consideration of the submissions of both sides with the basic law stated by the Federal Court in *Loot*'s case at p 69:

> The law relating to civil service in Malaysia is based upon a twin principle that every employee holds office during the pleasure of the Yang di-Pertuan Agong and that the qualifications for appointment and conditions of service are regulated by him, in addition and subject to any law on the same subject matters having been made by Parliament. So far Parliament has not yet made any law on the subject of civil service except ... The Constitution prescribes no limit on the scope and extent of the pleasure of the Yang di-Pertuan Agong ... Thus the pleasure of the Yang di-Pertuan Agong not only applies to tenure

> of office of an employee but also extends to a multitude of subject matters such as appointments, promotions, transfers ... These are all regulated by civil service rules known as Perintah-Perintah Am made by the Yang di-Pertuan Agong under cl 2 and art 132 and also various circulars, instructions issued from time to time by appropriate authorities in the Government.
>
> ... In our view as a civil servant holds office during pleasure, not only the length of his service is subject to pleasure but the place and time of his service is also similarly subject to pleasure ... Thus whether a civil servant should be transferred, and if so where and when the transfer is to be made are matters for the government to decide.

The same twin principle applies to the civil service in Sarawak by virtue of art 132(2) and (3) of the Federal Constitution so that every civil servant of the State of Sarawak holds office during the pleasure of the Yang Dipertua Negeri which means that the length, time and place of his service are subject to the pleasure of the Yang Dipertua Negeri except as expressly provided by the State Constitution and the PSC Rules made thereunder and subject to any State law which regulates the qualifications for appointment and conditions of service. Until the coming into force of the State Public Service (Conditions of Service) Ordinance (Cap 12/94) Sarawak and the State Public Service General Orders 1996 published as Swk LN 1/96, there was no State law on the subject. Unlike the Perintah-Perintah Am referred to in *Loot*'s case which were made by the Yang di-Pertuan Agong under art 132(2) of the Federal Constitution and published as PU (A) 203/80, the General Orders (Revised 1 May 1965) were not so made by the Yang Dipertua Negeri. They were derived from the Sarawak General Orders September 1956 which applied to civil servants before Malaysia Day and continued to so apply with revision in 1965 and amendments made from time to time. With the exception of transfer without a change of rank within a department of Government which remains the pleasure of the Yang Dipertua Negeri, the function of transfer of civil servants is assigned to the PSC. 'Transfer' of civil servants within the function of the PSC is not defined in the State Constitution, but in r 2 of the PSC Rules, to mean:

(a) the conferment upon a person in the public service of the State of a public office in any department other than that in which he last held substantive appointment.

(b) the conferment upon a person in the public service of the Federation or any State of the Federation, other than Sarawak of the public office in Sarawak.

With reference to the facts of the case under appeal, plainly only the meaning in (a) of 'transfer' is relevant. Transfer there means a transfer from one post to another post and from one department to another department, in short, an interdepartmental transfer of a civil servant.

General Order 40 so far as is relevant reads as follows:

> (1) Subject to the provisions of the Public Service Commission Rules, transfer of officers within Sarawak shall normally be effected as follows
>
> (a) administrative officers, officers of the Sarawak Administrative Service and officers of the General Clerical Service otherwise than

A within the same administrative Division or Department, by the State Secretary;

(b) departmental officers within the same Department, by the Head of that Department.

(c) officers of the General Clerical Service within the same administrative Division or Department, by the appropriate Resident or Head of Department who shall inform the State Secretary accordingly.

B

(2) Notwithstanding the provisions of paragraph (1) above, the State Secretary may effect the transfer of any officer without the consent of a Resident or Head of Department if such transfer is considered by him to be in the interest of the public service.

C

(3) ...

We agree with the PSC that GO 40 should be read in the light of GO 39. General Order 39 states thus:

D

> An officer shall be liable to serve in any part of Sarawak and to discharge the duties of any post in the public service in which the State Secretary may consider it desirable to employ him, provided that such employment does not entail a loss of salary.

GO 39 is a condition of service or of employment that the civil servant as an employee is liable to serve in any part of Sarawak and to discharge the duties E of any post once he accepts the offer of first appointment into the public service of the State. As a matter of government establishment practice, the offer of first appointment invariably makes reference to the conditions of service and instructions in the General Orders and any modification or substitution therefor to which the civil servant is subject and which are F binding in contract on the civil servant. It is an implied term of the contract that the civil servant is subject to transfer from one post to another post, from one department to another and from one part of Sarawak to another part of Sarawak.

The function of transfer from one post to another post involving two departments with or without a change of rank has been assigned to the PSC G by art 36(1) and is a matter for the PSC to decide unless the PSC has by art 36(6) delegated it generally or specifically to the State Secretary. Thus whether SSK should or should not be transferred from the post of Senior Accounting Officer in PWD to the post of Senior Accounting Officer in the State Treasury Department as in matter (a) above, is a matter properly within the function of the PSC and it is the duty of the PSC to decide. The H State Secretary has no power to decide on matter (a) unless that function has been delegated by the PSC to the State Secretary under a general or specific delegation. We hold accordingly.

For the purpose of administration, Sarawak is divided into Divisions, Districts and Sub-districts under the Administrative Areas Order 1987 I published as Swk LN 19/87. The transfer of a civil servant from one Division to another Division of Sarawak, in other words when and where within Sarawak he is to be transferred, is the right of the Yang Dipertua

Negeri which, to all intents and purposes means the State Government, is a matter for the State Government to decide. That right is not and never has been assigned to the PSC under art 36 of the State Constitution or by State law. It remains the right of the State Government as employer just as it remains the right of the Yang di-Pertuan Agong or the Federal Government in *Loot*'s case. Pre-Malaysia, that same right was vested in the Governor of the then Colony of Sarawak. Having regard to the provisions of art 132(2A) of the Federal Constitution relevant to a State as in the case of Sarawak, the appropriate successor to that right is undoubtedly the Yang Dipertua Negeri or the State Government — not the PSC or the State Secretary for that matter. The immediate predecessor of GO 39 was the former GO 67 of the Sarawak General Orders September 1956, the text of which read thus:

> An officer shall be liable to serve in any part of Sarawak and to discharge the duties of any post in which the Governor may consider it desirable to employ him, provided that such employment does not entail a loss of salary. An officer in Divisions I, II or III shall also be liable to serve on secondment in the State of Brunei.

In the course of the 1965 revision of the General Orders, GO 67 was renumbered as GO 39, 'Governor' was replaced by 'State Secretary', and the last full sentence was excised. In our view, the substitution of 'State Secretary' for 'Governor' would seem an error made in the revision exercise. Thus there is no question of the PSC deriving such right from the State Government and the State Secretary in turn derived it from the PSC by delegation under art 36(6) by way of direction in writing in the form of GO 40. With respect, here is where we differ from the PSC. In our view, firstly, 'transfer' in GO 40 does not bear the same meaning as 'transfer' in r 2 of the PSC Rules. Secondly, GO 40 is not a direction in writing under art 36(6) of the State Constitution. Thus, whether the transfer order is made under GO 40(1)(a) or GO 39 read with GO 40(2), we hold that the State Secretary has no power thereunder, concurrent or delegated, to decide on matter (a) in the transfer order. 'Transfer' in GO 40 refers to the transfer from one part of Sarawak to another part of Sarawak, that is to say, transfer within the State of Sarawak: see also the meanings of 'Resident' and 'Reference to Resident and/or Head of Department' respectively in GO 1. In our opinion, GO 40 refers to the right of State Government as employer to transfer its civil servants to any part within Sarawak and is a standing instruction from the State Government to the State Secretary, the appropriate Head of Department and the Resident of an administrative Division regulating who among them is to decide on behalf of the State Government on routine transfer of civil servants from one part of Sarawak to another in the ordinary course of administration involving the various categories of civil servants with the State Secretary retaining an overall say in special circumstances where such transfer is necessitated by the interests of the public service. Thus whether SSK should or should not be transferred to the Divisional Office of the State Treasury Department in Limbang in the 5th Division of Sarawak as in matter (b) above is a matter for the Yang Dipertua Negeri or the State Government to decide and we hold

A accordingly. Assuming (i) that in matter (a) above the PSC has duly decided that SSK should be so transferred and (ii) the transfer was routine, under GO 40(1)(b) the State Accountant General as Head of the State Treasury Department is instructed to decide on matter (b). Again, assuming (i) above and (ii) that the transfer was under special circumstances necessitated by the interests of the public service, then the B State Secretary is instructed under GO 40(2) to decide on matter (b).

In the light of our holding that the State Secretary has no power concurrent or delegated under GO 40(1)(a) or GO 39 read with GO 40(2) to decide on matter (a) in the transfer order we find no merit in the other arguments of the PSC under the sub-head '2 State Secretary has power to C transfer even without the 1989 retrospective Delegation'. With respect, in our view, these other arguments are confused and the confusion stems basically from a failure to distinguish between the function of transfer of the civil servant from one post to another and from one department to another which is assigned to the PSC and the right to transfer the civil servant from one part to another within the State of Sarawak which remains with the D State Government as the employer.

Next we consider the relevancy or otherwise of Delegation No 1/67 and Delegation No 1/89 in that order. The point in issue common to both these Delegations is whether the post of Senior Accounting Officer is named or mentioned expressly in the column headed 'Appointments or Duty Posts' E in the Schedule to Delegation No 1/67 and in the column headed 'Jawatan' (Office) in Jadual I (Schedule 1) to Delegation No 1/89 respectively. That point is a point of fact in both instances which is for the High Court to find.

In the case of Delegation No 1/67, the High Court found as a fact that the post of Senior Accounting Officer was not listed therein or covered thereby and consequently the transfer of a Senior Accounting Officer was F not within the delegated power. The case of the PSC put to us was that the post of Senior Accounting Officer PWD was a post renamed from an existing post and recategorised when the Suffian Circular was implemented in Sarawak. On these aspects it referred to the Joint Circular Memorandum of the Federal and State Secretaries dated 25 August 1967 and the Suffian G Circular respectively and urged us to take judicial notice of them as these were Government circulars. In these senses, as the PSC understood it, the 'creation' of the post of Senior Accounting Officer was made after Delegation No 1/67, a point which it complained that the High Court failed to take into consideration. Delegation No 1/67 did not categorise the post of Senior Accounting Officer as the Suffian Circular did but it maintained H that subsequent categorisation of such post under the Managerial and Sub-professional Group did not mean that SSK the incumbent of such post was not part of the Sarawak Administrative Service. By implication the PSC contended that SSK was part of the Sarawak Administrative Service. Further, it pointed out that SSK did not state in his affidavit that he was not part of the 'State Administrative Service'; he merely asserted that he was not I in the common user scheme. From the point of view of the PSC what was important was not the renaming or re-categorisation of the post of Senior Accounting Officer but the salary scale of C3–C5 which that post carried

with it. The PSC submitted that since the post of Senior Accounting Officer was on salary scale C3–C5, it was consistent with items 11, 12, 13 and 14 of the schedule to and was thus within Delegation No 1/67. A

With respect, it is a fact that 'Administrative Service', 'Sarawak Administrative Service', and the 'General Clerical Service' are three classes of offices in the public service of the State of Sarawak which are regarded as 'common user services'. In the public service of the State, there are numerous miscellaneous offices found in more than one department in addition to the common user services: see Pensions (List of Pensionable offices) Order 1976 published as PU (A) 221/76. There does not exist and never had existed or even heard of, another class of public office of the State called the 'State Administrative Service' named expressly in the submission of the PSC. Consequently, it makes no sense whatever if SSK were to state in his affidavit that he was or was not part of the 'State Administrative Service'. It is a fact established by PU (A) 221/76 which this court must take judicial notice that the office of Senior Accounting Officer is an office found in more than one department in the public service of the State. The sole inference to be drawn from that fact is that the office of Senior Accounting Officer is not part of the Sarawak Administrative Service, or the Administrative Service or the General Clerical Service and that it is not a common user service. In our view, what SSK asserted in his affidavit namely, that he was not in the common user service was true and correct and that the PSC was mistaken on that point. B C D E

On the background history of the post of Senior Accounting Officer PWD, it would be pertinent to note that it was already in existence in 1965, 1966 and 1967 under the name of 'Senior Assistant Accountant C4–5'. There was then only one (1) such post in the PWD. In 1968, the number of such post was increased to two (2) and the estimates of recurrent expenditure under 'Personal Emoluments' increased from $9,720 in 1967 to $12,600 in 1968. In 1968 also, the post of 'Senior Assistant Accountant C4–5' was re-titled to 'Senior Accounting Officer C4–5': see the approved Sarawak State Estimates of Expenditure for 1966, 1967 and 1968 at p 56. Thus, it was factually incorrect to have stated in the submission of the PSC that 'the creation of the post of Senior Accounting Officer was made after the 1967 Delegation Order'. Surely, there was a significant difference between the 'creation' of a post and the 're-styling' of an existing post. In the present case, the fact was that the post of Senior Accounting Officer C4–5 was created before and was in existence under its former name 'Senior Assistant Accountant C4-5' or its present name 'Senior Accounting Officer' whichever might have been the case at the time Delegation No 1/67 was made, depending on when exactly it was restyled following upon the Joint Circular Memorandum dated 25 August 1967. The query then was whether the post of Senior Assistant Accountant C4–5 or Senior Accounting Officer C4–5 was specified in the schedule to Delegation No 1/67. The answer was obviously in the negative. If it was ever intended to delegate to the State Secretary the power to transfer the Senior Assistant Accountant or the Senior Accounting Officer as the case might have been, then the PSC would no doubt have so specified in the schedule F G H I

A together with particulars of its Division and salary scale. The omission so to specify could only have meant that the PSC reserved to itself the power to transfer the Senior Assistant Accountant or its successor the Senior Accounting Officer and that the State Secretary had no delegated power to do so.

B In the light of what we just said, we agreed with the finding of fact by the High Court on this point, that Delegation No 1/67 was irrelevant to matter (a) of the transfer order and that the transfer order was in no sense validated by it. It was unnecessary for us to consider validity of Delegation No 1/67 as an instrument of delegation in respect of those appointments or duty posts specified in its schedule which had no bearing on this appeal.

C In the case of Delegation No 1/89, the High Court found as a fact that items 17 and 18 of Schedule 1 thereto were in respect of senior accounting officers of which SSK was one but held that in law (1) the transfer order could not be validated by the instrument of delegation which was dated after the date of the transfer order with retrospective effect to a date before D the transfer order; and (2) it was made without the requisite consent of the Yang Dipertua Negeri.

We agreed with the finding of fact made by the High Court, more specifically under item 18 of Schedule 1 to Delegation No 1/89. We said so because at the time of the transfer order, the relevant salary code of SSK was E A22 under the New Scheme having been upgraded from B3 with effect from 11 January 1982. Thus on the face of it, Delegation No 1/89 would appear to be relevant to matter (a) of the transfer order. However, the issue here was whether the transfer order was validated by the inclusion of item 18 of Schedule 1 to Delegation No 1/89 which was expressed to come into force on 20 December 1967.

F In giving the second reason for holding that Delegation No 1/89 was invalid the High Court stated in its judgment (at p 123):

> ... Another aspect of the matter concerning these two instruments of delegation is that, by art 36(6) of the Constitution, the PSC may by directions in writing and subject to such conditions as it thinks fit, delegate any of its G functions, which includes the function to transfer members of the public service, to any public officer, which includes the State Secretary. But art 37(3) of the Constitution requires that the discharge of the PSC's function by delegation must be done with the consent of the Yang Dipertua Negeri. However, looking at both exhs B2 (ie Delegation No 1/67) and C1 (ie Delegation No 1/89), there appears to be no such recital that such delegation H of power given to the State Secretary was so made with the consent of the Yang Dipertua Negeri. Both arts 36 and 37 of the Constitution require that the provisions contained therein and to be subject to the provisions of the Constitution. That being the case, anything done pursuant to art 36(6) must be read in the light of the requirement of art 37(3) thereof. Therefore, if I am wrong in saying that the instrument of delegation of 28 November 1989 cannot have retrospective effect, it is still invalid on account of it being made I without the consent of the Yang Dipertua Negeri as expressly required by art 37(3). In the circumstances, I am satisfied that the purported order of the State Secretary was an unlawful order made without the authority of the PSC.

SSK maintained that the second reason was correct, a point he raised in the High Court together with another one, namely that the PSC could not, without giving SSK an option, transfer him from the post of Senior Accounting Officer PWD to the post of Senior Accounting Officer in the State Treasury Department. The PSC disagreed with the second reason of the High Court; it maintained in the High Court and in its submission to us that the consent of the Yang Dipertua Negeri was unnecessary to the exercise by the PSC of its power to delegate under art 36(6). It was however, silent on whether SSK should be given an option.

Article 36(1), (3) and (6) of the State Constitution so far as are relevant provide as follows:

> 36 Functions of Constitution
>
> (1) Subject to the provisions of the Federal Constitution and of this Constitution, it shall be the duty of the Commission to appoint, confirm, emplace ..., promote, transfer and disciplinary control over members of the public service.
>
> (3) In clause (1), ... 'transfer does not include transfer without a change of rank within a department of Government.
>
> (6) The Commission may, by directions in writing and subject to such conditions as it thinks fit, delegate to any public officer, or to any board of public officers appointed by it, any of its functions under clause (1) in respect of any grade of members of the public service, and that officer ... shall exercise those functions under the direction and control of the Commission.

Article 37(3) of the State Constitution provides thus:

> The Commission may, subject to the provisions of this Constitution, regulate its procedure and make rules for that purpose, and with the consent of the Yang Dipertua Negeri may, in connection with the discharge of its functions, confer powers and impose duties on any public officer or any authority of the Government of the State.

From our understanding of art 36(1) and (6), the PSC has full executive authority in respect of those assigned functions and also has the direction and control over the exercise of those functions by their appointed delegate be that a board or a public officer. The exercise by the delegate of those functions can only be in the name and on behalf of the PSC and no other. Further, the exercise of those functions by the delegate are subject to compliance with such conditions as the PSC thought fit to impose and also to such general or specific directions in writing as may from time to time be given to the delegate. Thus, in our view, the right of the PSC to delegate any of its functions and the exercise of such right by the PSC are exclusive to the PSC alone. The power that the PSC delegates, is its own power and that power is executive in nature which involves the delegate making decisions which can result in a change of grade, rank, status or the salary of civil servants. If it is intended that the exercise of the right to delegate should not be exclusive to the PSC, then art 36(6) would have appropriately required such exercise to be with the approval of the Chief Minister not, the consent of the Yang Dipertua Negeri.

A Article 37(3) gives the right to the PSC to regulate its own procedure. The exercise of that right and enabling powers to make rules for that purpose is exclusive to the PSC and the consent of the Yang Dipertua Negeri is not required in that respect. The right to confer powers or impose duties on an officer or authority is the right of the State Government. By art 37(3) some right is delegated to the PSC to legislate to confer powers and B impose duties on the officer or authority to the extent that such powers and duties are necessary to the PSC in connection with the task of discharging its functions. But this right is not exclusive in the sense that its exercise by the PSC requires the consent of the Yang Dipertua Negeri. Hence, the exercise of its rule making powers to confer powers and impose duties C require the consent of the Yang Dipertua Negeri.

Thus in our view, arts 36(6) and 37(3) deal with two different and separate enabling powers of the PSC. Hence they should be read separately, not together. With respect, on this point of law we differ from the High Court and disagree with its second reason. In our view, the consent of the Yang Dipertua Negeri is not necessary to the lawful exercise by the PSC of D its exclusive right to delegate under art 36(6) any of its assigned functions including the function of transfer and Delegation No 1/89 is not rendered invalid by reason of the lack of such consent.

In dealing with the first reason for holding that Delegation No 1/89 could not validate the transfer order, it would be convenient to deal with the E topics of ratification by the PSC, the retrospective effect of Delegation No 1/89 and the presumption by the PSC of the validity of the transfer order since they are related to one another in sequence and to the same transfer order. These topics were canvassed in the submission of the PSC and had been dealt with by the High Court in its judgment from which we quote below passages relevant thereto:

F

On ratification:

> ... [Article] 36(1) of the Constitution, subject to the provisions of the Federal Constitution and of the Constitution itself, places the duty to transfer the members of the public service of the State on the PSC. The duty of the PSC, however, may by cl 6 be delegated by the PSC to any public officer, or to any G board of public officers appointed by it by way of directions in writing. Therefore, for the State Secretary to validly exercise the power of transfer of the applicant from one department of the government, ie the JKR, to another department, ie the Treasury Department, it must be pursuant to the delegation of powers given by the PSC. Without this express delegation, the State Secretary, on his own, has no power to transfer a member of the public H service from one department of government to another. It is irrelevant whether the PSC subsequent to the order for transfer, agrees with the decision so made by the State Secretary personally. The PSC cannot ratify the unlawful act of the State Secretary by such agreement ... Without such express delegated power the order of the State Secretary cannot be a lawful order.

I *On retrospective effect of Delegation No 1/89*:

> As the transfer involves the transfer from one department to another, clearly as stated earlier, the State Secretary has no power under the General Orders

to do so on his own. Though the instrument of delegation dated 28 November 1989 was produced to show that there was a delegation of power to the State Secretary to transfer a senior accounting officer on behalf of the PSC, the instrument was dated after the date of the purported order. The retrospective effect of the instrument to a date before the purported order cannot validate the order which is otherwise unlawful for to do so would adversely affect the substantive right of the applicant as at the date of the order only the PSC could order such a transfer. No delegation was yet given to the State Secretary then to do so.

On presumption of validity:

It is also said that the PSC is entitled to presume the transfer order of the State Secretary to be valid unless the said order was first declared by the court in a proper proceeding that it is invalid ... Thus at the time when the PSC made the decision to dismiss the applicant, the transfer order was not challenged in any court of law competent to pronounce upon the legality or lawfulness or otherwise of the transfer order. By this submission, I take it that the learned counsel is saying that the PSC had proper jurisdiction to institute disciplinary proceedings against the applicant on the ground that the order of the State Secretary was lawful unless and until pronounced otherwise by a court of competent jurisdiction. Since no pronouncement has been made so far, the applicant cannot question the validity of the order. In support, the case of F *Hoffman-La Roche & Co AG & Ors v Secretary of State for Trade and Industry* ... [1974] 3 WLR 104 was cited, particularly the dicta of Lord Diplock ... at p 131 ... Again, the point is missed because first, the order of the State Secretary is not a statutory instrument ... Secondly, we are here dealing with the jurisdiction of the PSC to institute disciplinary proceedings against the applicant. The condition precedent to the jurisdiction is to be based on the existence of the basis of the allegation of misconduct on the part of the applicant. If upon proper inquiry or investigation as required by r 26(1)(b) of the Rules, there is a basis to show that the applicant had committed misconduct, then the PSC has proper jurisdiction to frame a charge and require ... But in this case, ..., if a proper investigation was done instead of ..., the PSC would have discovered that the State Secretary has issued the order without proper authority. ... In any event, the presumption, if any, is rebutted by the fact that there was no valid delegation of power given by the PSC to the State Secretary for the attempted transfer of the applicant from one department of government to another as required by the Constitution.

On the topic of ratification, the PSC made four points namely that:

(i) failure of the High Court to consider the averment in Mazlan's affidavit affirmed on 5 December 1994 in which he stated that the PSC had decided that it agreed and confirmed the transfer order as its own order;

(ii) just because the delegated power of the State Secretary was questioned, did not make the act of transfer per se unlawful and the High Court was wrong to have stated that the decision of the State Secretary was unlawful;

(iii) the manner of transfer of public officers in Sarawak was not specified under the PSC Rules;

(iv) the State Secretary did act for the PSC on powers delegated by the PSC to the State Secretary and the PSC was a competent principal capable of issuing a transfer order itself.

We have before, in the course of this judgment, touched on points (ii), (iii) and (iv) one way or the other. In our view, they are without merit. There is no need for us to labour on them again.

On point (i) we take it that the PSC had in mind no other than paragraph 8 of Mazlan's affidavit. From the wording of the passage quoted from the judgment, it is clear to us that the High Court did in fact consider the relevancy or otherwise of the PSC's subsequent agreement and whether the transfer order was ratified thereby. It reasoned that the transfer order could not be lawful in the first place without express delegation from the PSC and such unlawful act could not be ratified by the latter's subsequent agreement. Paragraph 8 of Mazlan's affidavit states thus:

> After making the necessary preliminary investigations including calling for further information from the State Secretary's office on the said report, the Commission decided that the order issued by the State Secretary, relating to a transfer of an officer, who was in the Common User Service, was an order that the Commission agreed with, that is to say, the applicant should be transferred to the Treasury Department in Limbang and further, having regard to the matters contained in the said report of the State Secretary, it was an order that the applicant should have complied with. In other words, the applicant's failure or refusal to comply with that transfer order was a serious breach of discipline and of the General Orders, and the facts contained in the said report, if proved, would justify the applicant's dismissal from the State Civil Service.

The sole reason for the PSC's agreement according to Mazlan was that the post of senior accounting officer was a post in the common user service. This was the gist of the PSC's complaint of failure on the part of the High Court to consider. In fairness to the High Court, it did labour on that point in the early part of its judgment when dealing with the contention of SSK that he was not liable to be transferred out of PWD to another department such as the Treasury Department because the senior accounting officer's post was not a common user service. However, the High Court made no finding of fact one way or the other, partly because it was unclear as to what precisely was comprehended by the term 'common user service' and partly because in its view that point was rather insignificant. In the light of PU (A)221/76 the contents of which we have earlier taken judicial notice of, our view is that the PSC was clearly mistaken on a point of fact namely, that the post of senior accounting officer was a post in the common user service when it was not. In any case we agree with the reasoning of the High Court that the purported ratification was irrelevant and inconsequential: see the last sentence of para 6–110 of De Smith, Woolf and Jowell — *Judicial Review of Administrative Action* (5th Ed) and the cases and comments in footnote 1 at p 363.

On the topic of retrospective effect of Delegation No 1/89, the PSC's case was that that was allowed by s 15 of the Interpretation Ordinance

Cap 1 (Sarawak). He submitted that Delegation No 1/89 was valid and enforceable because: A

(a) the date of its coming into force was retrospective to 20 December 1967;

(b) it was 'remedial' in effect as changes to the nomenclature of posts, salary scales etc, have arisen since 1967 and in this regard he adverted to the memorandum dated 5 December 1989 from the PSC Secretary to the State Secretary which accompanied Delegation No 1/89; B

(c) Delegation No 1/89 only altered the procedure for effecting the transfer of public officers. A distinction must be drawn between what was substantive and procedural. He said that there was no substantive right in refusing to be transferred. C

As we said before, Delegation No 1/89 appeared to be relevant to matter (a) of the transfer order only because of items 18 of Schedule 1 thereto. The rest of the items in Schedule 1 did not concern this appeal. Thus, the issue before us was not whether Delegation No 1/89 was valid and enforceable as D the PSC put it. That would be for another day. The only relevant issue before us now was whether the transfer order as a whole was validated by the inclusion of item 18 in Delegation No 1/89, the latter Delegation having been expressed to come into force on 20 December 1967 although made on 28 November 1989.

We pointed out before that the transfer order was comprised of matter E (a) and matter (b). Matter (b) was regarded in law as procedural in the light of the Federal Court decision in *Loot*'s case. Whether or not a civil servant should or should not be transferred from one post to another and from one department of government to another as in matter (a) and whether such a transfer was a substantive or a procedural matter did not arise from the facts F in *Loot*'s case as the High Court in our present case correctly observed in its judgment. Consequently, the Federal Court made no decision on that matter one way or the other. In our view, transfer from post to post and from one department to another as in matter (a) was a substantive matter not a procedural one, because of the potential effect of a change of grade, rank, status and the salary of the civil servant. Thus, the power of the PSC G to decide on matter (a) as we said before was an executive power.

By item 18 of Delegation No 1/89, the PSC purported to delegate to the State Secretary with retrospective effect to 20 December 1967, their executive power to decide on matter (a), purportedly to validate the latter's decision on matter (a) made on or before 25 April 1987. The point here H was, whether subsequent vesting of power on the State Secretary by the PSC operated to validate the former's prior decision on matter (a) and thereby validate the transfer order as a whole.

In *LS v Director General of FACS* (1989) 18 NSWLR 481, a similar legal issue arose there as in the present appeal although the facts there and here bore no resemblance whatever. The issue there was whether the purported I vesting by a Minister in a delegate of authority retrospectively, operated to validate an order of the delegate (made without authority) that LS be dealt

with as an intellectually handicapped person under the provisions of Part IX of the Child Welfare Act. Young J at pp 487F–488B said:

> I know of no case where a minister has purported retrospectively to validate an authority. It is important to realise that this is not a case of ratification. Ratification occurs where for the purposes of contract or tort law a person adopts the relationship of agency assumed by the professing agent in an antecedent transaction: *Davison v Vickery's Motors Ltd (In Liq)* (1925) 37 CLR 1 at p 21. In the instant case what the defendant has to show is that on 21 December 1984 the Minister or his delegate was satisfied of the pre-conditions to making a s 46 order.
>
> Even in the case of a notice to quit, it is quite clear that the person who gives the notice must be authorised by the landlord at the time the notice is given and that subsequent investing of authority is not enough: see ..., see also *Legal and General Insurance of Australia Ltd v Board of Commissioners of New South Wales* [1982] 1 NSWLR 555 at 560, where McLelland J said with respect to fixing of a rate by the Board of Fire Commissioners:
>
> > '... If the fixing of the percentage ... could effectively be done by an agent of the board otherwise than by delegation under s 21B, as to which I have serious doubts, it is not, in my opinion, an act of a kind which, if done without authority, could be rendered effective by ratification ...'
>
> In my view the Minister's purported vesting in a delegate of authority retrospectively was of no effect with respect to the order under review.

Our understanding of *LS*'s case was that subsequent vesting of power in the delegate was insufficient; the power must exist at the time of its purported exercise by the delegate and that moment in time was crucial. Thus in the present appeal, it was not enough to show that subsequent to the transfer order, the State Secretary was by item 18 of Delegation No 1/89 delegated the power to decide on matter (a). It was for the PSC to show that on or about 25 April 1987 whether the State Secretary had the power to do so; since that was not shown at the trial, the decision on matter (a) was invalid; item 18 of Delegation No 1/89 was of no effect and the transfer order as a whole was not validated thereby. In our view, the High Court did not err on this issue and we agreed with its first reason for holding that the transfer order could not be validated by Delegation No 1/89.

On the topic of presumption of validity, the PSC's case was that they were entitled to rely on that presumption and to presume the validity of the transfer order until set aside. In this regard, they contended that the High Court misdirected itself in restricting the application of that presumption to statutory instrument. They cited *Baltim Timber Sdn Bhd v The Minister of Resource Planning & Ors* [1993] 2 CLJ 327, *Ferd Dawson Calvin v John Henry Browlow Carr & Ors* [1980] AC 574 (PC), *R v Panel on Take-overs and Mergers, ex p Datafin plc & Anor (Norton Opax plc and another intervening)* [1987] 1 All ER 564, and *Re Skinner (an infant); Skinner v Carter* [1948] 1 All ER 917 as instances of official decisions where that presumption were applied. SSK's stand was that there was no misdirection by the High Court. On his side, it was pointed out that there was nothing in the law of evidence called 'legal presumption of the validity of orders made by public authorities'. He repeated his submission made in the High Court

on this point namely, that the so-called presumption of validity, based on the void order of the State Secretary was a myth and a mockery of what Lord Diplock said in *F Hoffman-La Roche & Co AG & Ors v Secretary of State for Trade and Industry* [1974] 2 All ER 1128, [1974] 3 WLR 104 and added that the presumption never applied to an unlawful/void act by a usurper, such as the purported transfer order in this case.

Based on PU (A) 221/6, the fact was that neither the office of Senior Accounting Officer PWD of which SSK was the incumbent nor that of Senior Accounting Officer State Treasury Department of which Richard Leong Hee Cheong was the incumbent came under the common user services. They were offices found in more than one department. The transfer, as was expressly stated in the memorandum dated 25 April 1987 and the transfer order, was in exchange. In so far as the transfer exercise was from one post to another and from one department to another, in practice, this must involve the mutual acceptance of both incumbents before any transfer order could be issued. SSK's stand was that he never accepted to the transfer and was not given an option. Under art 36 of the State Constitution, the competent authority to issue the transfer order was the PSC in exercise of its power of transfer or its delegate in exercise of the power of transfer delegated to him by way of direction in writing. There was no question of the PSC invoking the presumption of validity in its favour because the decision to transfer SSK contained in the memorandum dated 25 April 1987 and the transfer order was, in law and in fact, not their decision. The decision to transfer SSK was actually that of the State Secretary alone in the name of his office and under GO 40(1)(a), alternatively under GO 39 read with GO 40(2); that was the right of the State Government to transfer civil servants within Sarawak as we said before. It was made not in the name or on behalf of the PSC or with reference to any power delegated in writing to him whatever in that memorandum or the transfer order. There was nothing in the terms of that memorandum or of the transfer order expressly or by implication to suggest the involvement of the PSC in the making of the decision to transfer SSK whereby it might be said that the decision was that of the PSC to entitle the latter to invoke the presumption of validity: see the approach of Young J vis-a-vis the Regional Director's order on this point in *LS*'s case. Thus we found no merit in the submission of the PSC on this ground.

The issue of threshold jurisdiction of the PSC based on the decision of the Supreme Court in *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685 was not one raised in the submissions of both sides and the High Court made no decision on it. It was a new point raised in the written submission of the PSC to us which we decline to entertain.

Finally, the PSC submitted that the High Court should not grant the order of certiorari, a discretionary relief, which like specific performance, would have the effect of reinstatement of SSK to the post of Senior Accounting Officer, PWD and they cited *Mohd bin Ahmad v Yang di Pertua Majlis Daerah Jempol, Negri Sembilan & Anor* [1997] 2 MLJ 361 (FC).

A It was a fact declared by PU (A) 221/76 that the office of the Senior Accounting Officer of which SSK was the incumbent at that time was a pensionable office with effect from 1 January 1970 and that he was not a person whose renumeration was calculated on a daily rate. He was thus a member of the public service of the State of Sarawak and was under the jurisdiction of the PSC. There was no contract between the PSC and SSK;
B the contract was between the State Government and SSK. So specific performance as a private law relief against the PSC was out of the question. His redress against the PSC lay in the area of public law of which certiorari was one. In this regard the relief asked for in SSK's notice of motion under O 53 r 2 dated 12 December 1990 before the High Court was in terms as
C follows:

> for an Order of Certiorari to remove into this Honourable Court for the purpose of being quashed the decision made by the State Public Service Commission Sarawak on the 14th day of December 1988 whereby it was ordered that *Sarjit Singh Khaira* be dismissed from the State Service as an Accounting Officer with effect from 1 January 1989, ...
>
> D And for an order that the costs of and occasioned by this motion be paid by the Government of Sarawak to the applicant to be taxed.

The order granted in the last paragraph of the judgment of the High Court was substantially in the terms of the motion. Although it expressed the view that quashing a decision might have the consequence of reinstatement, the
E High Court made no such order and gave its reasons for not doing so, which we agreed. No copy of the sealed order of court was included in any part of the Appeal Record. We had some difficulty in understanding exactly what the complaint was in this submission of the PSC and the relevancy of citing *Mohd bin Ahmad*'s case. At any rate we found no merit in this submission.

F For these reasons stated, we held on the question of law that the PSC lacked jurisdiction to initiate disciplinary proceeding against SSK and to dismiss him from the public service of the State based on the report of the committee of enquiry. Consequently, we affirmed the judgment of Kuching High Court II, dismissed the appeal of the PSC with costs and directed the deposit to be paid to SSK towards the account of taxed costs. We also
G dismissed the cross-appeal of SSK. We ordered accordingly.

Appeal dismissed with costs.

Reported by Zahid Taib

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